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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

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Arizona Corporation Commission  
**DOCKETED**

APR 11 2008

DOCKETED BY  
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In the Matter of the Investigation into  
Preferred Carrier Arrangements and  
Other Potentially Anti-competitive  
Practices involving Service to Residential  
or Business Developments

DOCKET NO. T-00000K-04-0927

Accipiter Communications'  
Second Supplemental Comments  
Regarding Preferred Provider  
Agreements  
And Proposed Rule

Accipiter Communications, Inc., ("Accipiter"), now doing business as Zona Communications, by and through undersigned counsel, hereby submits its Second Supplemental Comments in this generic docket ("Generic Docket"). In these comments, Accipiter proposes a rule for consideration by the Commission and the parties. The proposed rule (attached as Appendix A) is designed to promote fair and open competition among local telecommunications service providers while curtailing the troubling

1 anticompetitive aspects<sup>1</sup> of preferred provider agreements and also keeping the level of  
2 regulatory oversight to a minimum.

3 The attached proposed rule is modeled from the regulations adopted by the North  
4 Carolina Utilities Commission promulgated as its Rule R20-2, entitled Fair Competition  
5 Among Local Telecommunications Service Providers (the "North Carolina rule"). Much of  
6 the structure, principles, and terminology in the attached proposed rule was borrowed from  
7 the North Carolina rule. However, there are several modifications in Accipiter's proposed  
8 rule to more specifically address the issues we are facing in Arizona and to bolster the  
9 North Carolina Utility Commission's approach where we and the North Carolina staff  
10 believe it falls short. For the Commission's convenience, a copy of the North Carolina rule  
11 is also attached hereto as Appendix B.  
12

13  
14 **1. End the Secrecy.**

15 The central premise in the proposed rule is that all preferred provider contracts  
16 should be completely transparent. In the proposed rule, all preferred provider contracts are  
17 required to be filed with the Commission and open for public inspection. The intent is to  
18 end the secrecy that currently envelops these agreements. Agreements between local  
19 exchange carriers and the people that effectively control the access to customers should be  
20 public, not secret and no exceptions. The customers should know, the Commission should  
21

22  
23 <sup>1</sup> For a further discussion of anticompetitive aspects of preferred provider agreements, see  
24 e.g., the Initial Comments of Accipiter Communications, Inc, docketed March 22, 2007,  
25 and the Supplemental Comments of Accipiter Communication, Inc., docketed July 17,  
26 2007, in this Generic Docket.

1 know, and the competition should know all terms of these secret deals that are far too often  
2 designed to pay a developer to keep out all competition.

3 Like the North Carolina rule, the proposed rule defines "preferred provider  
4 contracts" to include agreements between a local exchange carrier and the people that  
5 control access to a development that create special status or rights not available to other  
6 local exchange carriers. Also like the North Carolina rule, there are three types of  
7 provisions in preferred provider contracts that are declared void: "exclusive access  
8 provisions," "exclusive provisioning provisions," and "weighted commission provisions."

10 **2. Offering Resale Does Not Justify Weighted Commission Payments.**

11 "Weighted commission provisions" are terms in a preferred provider contract that  
12 specify the payment of commissions that are based on the number of customers in the  
13 development who purchase service from the preferred provider, or are based on a  
14 percentage of the revenues received by the preferred provider, or that otherwise provide a  
15 financial incentive to exclude competitors from the development.  
16

17 In the North Carolina rule "exclusive access provisions" and "exclusive provisioning  
18 provisions" are banned outright with no exceptions, which we agree with. However, under  
19 the North Carolina rule "weighted commission provisions" are only banned if the preferred  
20 provider refuses to offer resale to its competitors in the development. (See the North  
21 Carolina Rule R20-2(a),(b) & (c).) Accipiter is advised that this option for circumventing  
22 the prohibition of weighted commission provisions in most circumstances does not offer a  
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1 viable option for competition, and instead, it significantly undermines the effectiveness of  
2 the North Carolina rule. We understand that this concern is also expressed by some in the  
3 Utilities Commission Staff in that State.

4       The solution that Accipiter proposes is to remove the proviso from the clause  
5 banning weighted commission provisions that allows a preferred provider to get around the  
6 ban by merely agreeing to offer resale of its services. This approach proposed by Accipiter  
7 also allows for the elimination of the complex provisions allowing for a preferred provider  
8 to become an "electing provider" or an "exempted provider" found in the North Carolina  
9 rule. It also eliminates the need for the other complex regulatory provisions and processes  
10 that would go along with a resale provision such as resale tariffing of CLECs and the like.

11       It is critically important to address effectively weighted commission provisions.  
12  
13 These provisions often require a preferred provider to pay a percentage of its revenues to  
14 the developer with the percentage kickback increasing if the developer achieves higher  
15 market penetration rates for the preferred provider. The revenue streams produced by these  
16 kickbacks often last for a decade or longer and are tremendously powerful in shaping the  
17 behavior of the recipients. No matter how they are characterized as something different or  
18 dressed up by the carriers that use them, weighted commission provisions amount to  
19 nothing more than an Arizona local exchange carrier contracting to pay a developer to  
20 exclude the competition, and they work as intended. Weighted commission provisions  
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1 should be banned just like exclusive access provisions and exclusive provisioning  
2 provisions should be banned.

3 **3. The Rules Should Not be Easily Bypassed by Acting Through Affiliates.**


4 To prevent a local exchange carriers from easily bypassing the rules by merely  
5 acting through an affiliate that may not be directly subject to Commission's regulation, the  
6 proposed rule is drafted to impose the status of a preferred provider and the duties that go  
7 along with that status on any local exchange carrier that enters into such agreements either  
8 directly or through an affiliate.

9  
10 **4. Conclusion.**

11 Accipiter believes that the rule it is proposing addresses many of the problems and  
12 concerns that Accipiter is facing in its service area. Also we believe it addresses concerns  
13 expressed by other carriers and concerns that we have noticed Staff raising in other dockets  
14 as well. The proposed rule, with its requirements for public disclosure, and its banning of  
15 exclusive access provisions, exclusive provisioning provisions, and weighted commission  
16 provisions, is narrowly tailored to address the problematic aspects of preferred provider  
17 agreements. At the same time, the proposed rule allows sufficient room for robust and  
18 innovative competition among competing providers of telecommunications services. It  
19 should effectively foster the benefits to consumers that are inherent in a competitive  
20 marketplace with a minimum of regulatory intervention and oversight without interfering  
21 with real estate development.  
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1 RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of April, 2008.

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## **APPENDIX A**

**Rule R14-2-\_\_\_\_\_. Fair Competition Among Local Telecommunications Service Providers.**

(A.) In this Article, unless the context otherwise requires:

(1) "Affiliate," with respect to the public utility, shall mean any other entity directly or indirectly controlling or controlled by, or under direct or indirect common control with, the public utility. For purposes of this definition, the term "control" (including the correlative meanings of the terms "controlled by" and "under common control with"), as used with respect to any entity, shall mean the power to direct the management policies of such entity, whether through ownership of voting securities, or by contract, or otherwise.

(2) "Development" means a residential subdivision, office park, shopping center or other area with clearly defined boundaries being developed as a unified entity by one or more landlords or developers.

(3) "Exclusive access provisions" are provisions of a preferred provider contract that prohibit the developer, manager, owner or other party controlling access to a development from allowing competitors of the preferred provider to enter upon the development premises or easements and rights-of-way appurtenant thereto, or provisions of a preferred provider contract that require the developer, manager, owner or other party controlling access to a development to impose restrictions or requirements on such third party access which are not imposed on the preferred provider

(4) "Exclusive provisioning provisions" are provisions of a preferred provider contract that prohibit the developer, manager, owner or other party controlling access to a development from allowing competitors of the preferred provider to provide services in a development or provisions of a preferred provider contract that require the developer, manager, owner or other party controlling access to a development to impose restrictions or requirements on the provisioning of such third party service which are not imposed on the preferred provider and which are anticompetitive in nature.

(5) "Local Exchange Carrier." A telecommunications company that provides local exchange service as one of the telecommunications services it offers to the public.

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(6) "Local Exchange Service." The telecommunications service that provides a local dial tone, access line, and local usage within an exchange or local calling area.

(6) "Preferred provider" means a local exchange carrier that itself or its affiliate has entered into a preferred provider contract or intends to enter into a preferred provider contract.

(7) "Preferred provider contract" means a contract or other agreement between a local exchange carrier or its affiliate and the developer, manager, or owner of a development or other party controlled by the developer, manager, or owner of a development, giving the preferred provider or its affiliate special status or rights not available to other local exchange carriers.

(8) "Weighted commission provisions" are provisions of a preferred provider contract providing for the payment of commissions to an owner or developer that (A) are based on the number of customers in the development who purchase service from the preferred provider or its affiliate, or (B) are based on a percentage of the revenues received by the preferred provider or its affiliate from customers in the development, or (C) otherwise provide a financial incentive for the owner or developer to exclude competitors of the preferred provider from the development.

(B) Exclusive provisioning provisions in preferred provider contracts are anticompetitive and void.

(C) Exclusive access provisions in preferred provider contracts are anticompetitive and void.

(D) Weighted commission provisions in preferred provider contracts are contrary to public policy and void.

(E) Every preferred provider shall file with the Commission a copy of each preferred provider contract and any amendments thereto along with the following information, all of which shall be open for public inspection:

(1) For each development where there is a preferred provider contract, the preferred provider shall provide the following information to the Commission along with the copy of the preferred provider contract:

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- (a) The name and location of the development, and the name of the developer.
  - (b) The identity of the parties to the preferred provider contract.
  - (c) The identity of the incumbent local exchange carrier, if any, in whose franchise area the development is located.
  - (d) Whether the preferred provider contract includes exclusive provisioning provisions.
  - (e) Whether the preferred provider contract includes exclusive access provisions.
  - (f) Whether the preferred provider contract includes weighted commission provisions.
  - (g) For all amendments to a preferred provider contract, the location within the preferred provider contract of all amended provisions shall be identified.
  - (h) Any other information as requested by Staff.
- (2) The copy of each preferred provider contract and the other required information shall be filed within 21 days after the effective date of this rule, if the provider is a party to any existing preferred provider contract.
- (3) Every preferred provider shall mail a copy of each preferred provider contract along with the information specified in subparagraph (E)(1) above to each incumbent local exchange carrier, if any, in whose franchise area any portion of the development is located.
- (4) At least 90 days prior to entering into any new preferred provider contract or amending any existing preferred provider contract, the preferred provider shall file with the Commission a copy of the proposed new or amended preferred provider contract along with the information provided in subparagraph (E)(1) above, and at the same time shall mail a copy of each proposed new or amended preferred provider contract along with the information specified in subdivision (1) above to each incumbent local exchange carrier, if any, in whose franchise area the development is located.

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(F) The preferred provider shall provide notice of trench openings at least 60 days in advance of the opening of each utility trench within the development that may contain telecommunications facilities. The notice shall be provided to each incumbent local exchange carrier, if any, in whose franchise area any portion of the development is located. The notice shall also be provided to each competitive local exchange carrier that intends to provide service in the development and has requested such notification from the preferred provider. If such trench opening is scheduled by others with less than 14 days notice, the preferred provider shall provide the notice by expedited means promptly upon the preferred provider or its affiliate learning of the trench opening.

(G) No local exchange carrier or its affiliate may maintain a preferred provider contract in effect in any development unless the local exchange carrier has duly filed with the Commission and mailed to the incumbent local exchange carrier, if any, a copy of the preferred provider contract along with the required additional information specified above.

(H) In every development where a local exchange carrier or its affiliate has entered into a preferred provider contract containing provisions that are declared void under subsections (B), (C) or (D) of this rule, the local exchange carrier shall, within 21 days after the effective date of this rule, mail to each of the parties to the preferred provider contract a letter advising such party that certain portions of the contract have been determined to be void. The following materials shall be attached to the letter: a copy of the preferred provider contract, with the void provisions conspicuously marked; a copy of this rule; and a copy of the Commission's order adopting this rule.

## **APPENDIX B**

- (4) "Telecommunications provider" means any public utility that provides telecommunications service.

(NCUC Docket No. P-100, Sub 148, 07/12/01.)

**Rule R20-2. Fair Competition Among Local Telecommunications Service Providers.**

(a) For purposes of this rule, the following definitions shall apply:

- (1) "Development" means a residential subdivision, office park, shopping center or other area with clearly defined boundaries being developed as a unified entity by one or more landlords or developers.
- (2) "Electing provider" means a preferred provider that has chosen to make subloops available to competitors pursuant to subsections (f) and (h) of this rule.
- (3) "Exclusive access provisions" are provisions of a preferred provider contract that prohibit the developer, manager, owner or other party controlling access to a development from allowing competitors of the preferred provider to enter upon the development premises or easements and rights-of-way appurtenant thereto, or provisions of a preferred provider contract that require the developer, manager, owner or other party controlling access to a development to impose restrictions or requirements on such third party access which are not imposed on the preferred provider and which are anticompetitive in nature.
- (4) "Exclusive provisioning provisions" are provisions of a preferred provider contract that prohibit the developer, manager, owner or other party controlling access to a development from allowing competitors of the preferred provider to provide services in a development or provisions of a preferred provider contract that require the developer, manager, owner or other party controlling access to a development to impose restrictions or requirements on the provisioning of such third party service which are not imposed on the preferred provider and which are anticompetitive in nature.
- (5) "Exempted provider" means a preferred provider that is a local exchange company and is not required under federal law to make subloops available to its competitors, or a preferred provider that is a competing local provider and would not, if it were a local exchange company, be required to make subloops available to its competitors.
- (6) "Local service provider" includes any competing local provider, as defined in G.S. 62-3(7a), and any local exchange company, as defined in G.S. 62 3(16a).
- (7) "Preferred provider" means a local service provider that has entered into a preferred provider contract.
- (8) "Preferred provider contract" means a contract between a particular local service provider and the owner or developer of a development, giving the preferred provider special status or rights not available to other local service providers.

*NORTH CAROLINA*



(9) "Weighted commission provisions" are provisions of a preferred provider contract providing for the payment of commissions to an owner or developer that (A) are based on the number of customers in the development who purchase service from the preferred provider, or (B) are based on a percentage of the revenues received by the preferred provider from customers in the development, or (C) otherwise provide a financial incentive for the owner or developer to exclude competitors of the preferred provider from the development.

(b) Exclusive provisioning provisions in preferred provider contracts are anticompetitive and void.

(c) Exclusive access provisions in preferred provider contracts are anticompetitive and void.

(d) Weighted commission provisions in preferred provider contracts are contrary to public policy and void, except as provided in subsections (f) and (g) below.

(e) Every preferred provider shall file with the Commission a Preferred Provider Notice. There shall be a single notice for each preferred provider, rather than separate notices for each development where a preferred provider contract exists. The notice shall comply with the following requirements:

(1) For each development where the provider has entered into, or will enter into, a preferred provider contract, the Preferred Provider Notice shall provide the following information:

(A) The name and location of the development.

(B) The identity of the parties to the contract.

(C) The identity of the local exchange company, if any, in whose franchise area the development is located.

(D) Whether the contract includes exclusive provisioning provisions.

(E) Whether the contract includes exclusive access provisions.

(F) Whether the contract includes weighted commission provisions, and if so, whether the provider is filing an Electing Provider Attachment under subsection (f) of this rule or an Exempted Provider Attachment under subsection (g) of this rule.

(2) The Preferred Provider Notice shall be filed within 21 days after the effective date of this rule, if the provider is a party to any existing preferred provider contract. Before entering into any new preferred provider contract, a local service provider shall file an updated Preferred Provider Notice (or a new notice, if it has not filed such a notice previously) containing the information provided in subdivision (1) above with respect to the new preferred provider contract. Before amending any preferred provider contract in a manner that affects the information in the Preferred Provider Notice, a local service provider shall file an updated Preferred Provider Notice.

(f) A preferred provider may become an electing provider by filing with the Commission an Electing Provider Attachment that meets the requirements of subdivisions (1) through (3) below. An electing provider, within the developments specified in its Electing Provider Attachment, may enter into preferred provider contracts containing weighted commission provisions and may continue to enforce existing preferred provider contracts containing such provisions.

(1) The Electing Provider Attachment shall be attached to the electing provider's Preferred Provider Notice. It shall identify the name and location of each development to which it is applicable.

(2) The Electing Provider Attachment shall state that within the developments to which it applies, the electing provider will make unbundled subloops available to its competitors pursuant to this rule. It shall specify the basic terms under which subloops will be offered, and such terms shall be consistent with this rule and any applicable orders of the Commission.

(3) The Electing Provider Attachment may be updated to specify additional developments to which it is applicable. Any such update shall be filed before the electing provider enters into any preferred provider contract with weighted commission provisions relating to any of the additional developments.

(g) A preferred provider may become an exempted provider by filing with the Commission an Exempted Provider Attachment that meets the requirements of subdivisions (1) through (3) below. An exempted provider, within the developments specified in its Exempted Provider Attachment, may enter into preferred provider contracts containing weighted commission provisions and may continue to enforce existing preferred provider contracts containing such provisions.

(1) The Exempted Provider Attachment shall be attached to the exempted provider's Preferred Provider Notice. It shall identify the name and location of each development to which it is applicable.

(2) The Exempted Provider Attachment shall state either (A) that the exempted provider is a local exchange company and is not required by federal law to make subloops available to competitors in any of the developments to which the attachment is applicable, or (B) that the exempted provider is a competing local provider, and if it were a local exchange company, it would not be required by federal law to make subloops available to competitors in any of the developments to which the attachment is applicable.

(3) The Exempted Provider Attachment may be updated to specify additional developments to which it is applicable. Any such update shall be filed before the exempted provider enters into any preferred provider contract with weighted commission provisions relating to any of the additional developments. For each development for which exemption is asserted in an initial or updated Exempted Provider Attachment, the provider shall submit an affidavit, signed by an engineer with direct personal knowledge of the facilities serving the development, that specifies with particularity the provider's factual and legal basis for asserting the exemption.

(4) A local service provider may challenge an Exempted Provider Attachment by filing a petition seeking review of such Attachment with the Commission. In the event of such a challenge, the Public Staff shall investigate such challenge and file its report and recommendations concerning the merits of such challenge within 30 days of the filing of the challenge. The party asserting exemption shall bear the burden of demonstrating entitlement to the exemption by clear and convincing evidence. Any such challenge shall, to the extent practicable, be given priority on the Commission's docket.

(h) No local service provider may maintain a preferred provider contract in effect in any development unless it has duly filed with the Commission a Preferred Provider Notice that makes reference to the development, together with any applicable Electing Provider Attachment or Exempted Provider Attachment.

(i) Preferred Provider Notices, Electing Provider Attachments and Exempted Provider Attachments shall be subject to the following filing requirements:

(1) Each preferred provider shall file its Preferred Provider Notice, together with any Attachments, in a docket to be designated by the Commission.

(2) The first Preferred Provider Notice filed by a particular preferred provider shall be labeled "Preferred Provider Notice – Version 1." The first updated Preferred Provider Notice filed by such provider shall be labeled "Preferred Provider Notice – Version 2," and subsequent updates shall be numbered sequentially.

(3) Whenever an Electing Provider Attachment or Exempted Provider Attachment is updated, the provider shall file an update of the entire Preferred Provider Notice, including the Attachments, with a new version number, even if the only changes are in one of the Attachments.

(j) When a competing local provider that is an electing provider receives a request from a competitor for subloops in a given development, the parties shall negotiate in good faith. If they are not able to reach agreement, the following requirements shall apply:

(1) The subloops shall be provisioned within the same time period that the local exchange company in whose franchise area the development is located makes subloops available. If no such period exists, such subloops shall be provisioned within seven days.

(2) At any point 60 or more days after the receipt of a bona fide request for subloop interconnection, either party may request the Commission to set a subloop rate for the electing provider.

(3) There is a rebuttable presumption that the appropriate rate for a subloop is the applicable subloop rate of the local exchange company in whose franchise area the development is located. If there is no such rate in existence, then the rebuttably presumptive subloop rate is BellSouth's Zone 1 subloop rate.

(4) The party seeking a departure from the rebuttably presumptive subloop rate shall have the burden of proof to demonstrate that such rate is not just and

reasonable.

(5) The Commission will fix the subloop rates for a competing local provider that is an electing provider on a company-wide basis in an initial contested proceeding. If the rate fixed by the Commission is different from the rate previously being paid by the subloop purchaser in the contested proceeding, a true-up shall be performed.

(k) Every preferred provider, within the development to which its preferred provider contract applies, shall make its service available to competitors for resale. If the preferred provider is a competing local provider, the following requirements shall apply:

(1) Unless the competing local provider and the reseller agree on a different rate, the wholesale discount percentage offered by the competing local provider shall be the same wholesale discount percentage offered by the local exchange company in whose franchise area the development is located. If no such wholesale discount percentage has been determined, the discount percentage established for BellSouth in Docket No. P-140, Sub 50 shall apply.

(2) If either party contends that the discount percentage provided for in subdivision (1) above is inappropriate, it may request the Commission to calculate the discount based specifically on the circumstances of the competing local provider. If the discount percentage fixed by the Commission is different from the percentage previously being paid by the reseller in the contested proceeding, a true-up shall be performed.

(l) In every development where a local service provider has entered into a preferred provider contract containing provisions that are void under subsections (b), (c) or (d) of this rule, the local service provider shall, within 21 days after the effective date of this rule, mail to each of the parties to the preferred provider contract a letter advising such party that certain portions of the contract have been determined to be void. The following materials shall be attached to the letter: a copy of the preferred provider contract, with the void provisions conspicuously marked; a copy of this rule; and a copy of the Commission's order adopting this rule.

(NCUC Docket No. P-100, Sub 152, 01/12/06)

#### CHAPTER 21

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